UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 26468 and MERCHANT MARINER'S DOCUMENT No. 438-78-4714
Issued to: Russell Dale Gayneaux

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2288

Russell Dale Gayneaux

This appeal has been taken in accordance with Title 46, United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 10 February 1982, and Administrative Law Judge of the United States Coast Guard at Galveston, Texas suspended Appellant's license and Merchant Mariner's Document for one month plus an additional two months on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges that, while serving as operator of the M/V OSASGE, under authority of the documents above captioned, on or about 17 October 1981, the Appellant failed to properly navigate said vessel within the confines of the Gulf Intracoastal Waterway, resulting in damage to an aid to navigation, at or near North Deer Island, near mile 360 and the Galveston Freeport Intracoastal Waterway Range F, front light.

By separate order of 17 February 1982, the Administrative Law Judge authorized a temporary license and document pending disposition of the appeal. Issuance pursuant to this order was effected by the Marine Inspection Office, U.S. Coast Guard, Port Arthur, Texas on 17 February 1982.

At the hearing held on 12 January 1982 at Galveston, Texas the Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification. The Investigating Officer introduced in evidence eight exhibits and the testimony of one witness.

In defense, Appellant offered in evidence one exhibit and his own testimony.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order suspending the captioned license and document. The entire decision and order was served on 16 February 1982. Appeal was timely filed on 24 February 1982.

FINDINGS OF FACT

On 17 October 1981 the Appellant was employed by Conoco Inc. as operator of the uninspected towing vessel OSAGE, O.N. 625691. He was serving under the authority of his Coast Guard issued license. The sixty-five foot towboat OSAGE, pushing two empty tank barges in tandem, was en route from Chocolate Bayou, near West Galveston, Texas to the Conoco Oil docks in West Lake, Louisiana, via the Gulf Intracoastal Waterway. The vessel OSAGE is a diesel powered towboat of one hundred thirty-eight tons with a steel hull. The two empty barges being pushed by the OSAGE were the CONOCO 7004, O.N. 618835 and the CONOCO 7005, O.N. 620488. The CONOCO 7004 was the lead barge. It has a length of 297 feet and gross tonnage of 1876. The CONOCO 7005 is similar in size and type. Both barges were substantially empty and had a draft of approximately eighteen inches at the time of the allision.

The flotilla was traveling easterly. The weather conditions were good. Visibility was good with the wind blowing out of the south at approximately ten miles per hour across the waterway.

Near mile 360 at approximately 1530, the Appellant, who was then operating the OSAGE, attempted to make a slight turn to starboard near North Deer Island to follow the Intracoastal Waterway through the Causeway and Railroad Bridge to Galveston Island. The barges began to drift to the north. He backed down but the bow of the CONOCO 7004 allided with the front light on Range F. This light is a fixed structure, approximately 500 feet north or the channel of the waterway.

At the time of the allision, there was a chop on the water, the tide was low, with swells of one and one half feet in a northerly direction.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

(1) the specification and charge are overbroad and fail on their face to bring a specific charge as required by law and the Constitution of the United States;

(2) evidence presented by the Investigating Officer concerning wind velocity and tidal movements was improperly admitted;

(3) it was improper for the government to reopen its

case after resting and when the presentation of its evidence had been closed;

(4) the Administrative Law Judge, improperly failed to grant Appellant's Motion for an Instructed Verdict based on an insufficiency of evidence at the close of the case against him;

(5) the admission into evidence of U. S. Coast Guard Form CG-2692 was improper as it contained admissions by the Appellant, was admitted against his objection and was hearsay;

(6) the charge of negligence was not proven;

(7) if the charge of negligence was proven under the presumption rule, then it was successfully rebutted by the Appellant;

(8) the findings were inconsistent with the determination of the sufficiency of evidence and mandate reversal of the findings;

(9) the sanction imposed was excessive considering the mitigating circumstances.

Appearance: Ben L. Reynolds, Esquire
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OPINION

I

The Appellant contends that the pleadings were so imprecise as to be defective under the Constitutional guarantees of due process in criminal proceeding citing in support thereof, Bulger v. Benson, 262 Fed. 929 (9th Cir., 1920) and Fredenberg v. Whitney, 240 Fed. 819 (W.D. Wash., 1917). Administrative proceedings under 46 U.S.C 239 have been consistently held to be a remedial sanction rather than a penal one since the primary purpose is to provide a deterrent for the protection of seamen and for safety of life at sea. Appeal Decision 1931 (POLLARD). An R.S. 4450 suspension and revocation proceeding has never been held to be a criminal action. Appeal Decisions 2049 (OWEN), 2029 (CHAPMAN), 2124 (BARROW). Time and again, the Commandant has had occasion to distinguish Bulger and Fredenber as they relate to suspension and revocation proceedings. For a detailed discussion of both of the cases see

Appeal Decision 1574 (STEPKINS). Also, see Appeal Decisions 1832 (CABALES), 1979 (NEVES), 2039 (DIETZE).

Appellant contends that he was denied due process of law by an amendment to the pleadings which was brought about, at least in part, by his own motion. Since the function of the specification is notice as to the issues so that a person appearing before an Administrative Law Judge can identify the matter with which he is charged, identification of place is ordinarily not of essence. Appeal Decision 1961 (WASKASKI). In order to be more specific as to location, and on the Appellant's motion, the Administrative Law Judge allowed the specification to be amended by adding to the end, after the words "damage to an aid to navigation", the words "at or near North Deer Island, near Mile 360 and Galveston-Freeport Intracoastal Waterway Range F, front light." 46 CFR 5.20-65(b) provides that the Administrative Law Judge may, on his own motion or the motion of the Investigating Officer or person charged, permit the amendment of charges and specifications to correct harmless errors by deletion or substitution of words or figures. The Administrative Law Judge properly recognized that the addition of the words as set out above did not alter the specification such that the Appellant was misled as to the nature of the charge, nor did the Appellant, at any time during the hearing, allege that he did not know what the charges against him were. The Appellant had adequate opportunity to defend against the charge and specification and, in fact, took full advantage of that opportunity. Appellant cannot now be heard to complain that he was denied due process of law because of a housekeeping amendment made at the hearing under the principles enunciated in Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir. 1950). I am convinced that the Appellant was neither surprised nor injured by these conforming amendments.

II

Appellant contends and/or suggests that evidence concerning weather conditions (Exhibit Number 2), tide current conditions (Exhibits Number 3a, 3b and 3c), tidal current calculations (Exhibits Number 5a, and 5b), as well as tide time and tidal difference tables (Exhibits Number 6a, and 6b), were admitted without proper certification. Additionally, he contends that the Investigating Officer testified as to calculations and interpolations he made concerning Exhibits Number 3 and 6; and that there was no stipulation or showing as to his expertise concerning his calculations and further, that this "witness" was not subject to cross-examination.

On the documentary admissibility issue, concerning all but Exhibit Number 5, the issue is not certification but rather authentication and identification as well as admissibility. Under

46 CFR 5.20-95 strict adherence to the rules of evidence observed in courts is not required in these administrative proceedings. All relevant and material evidence, but for certain minor exceptions, may be received into evidence. Notwithstanding this more relaxed posture, Exhibits 2, 3, and 6 would be admissible in court even under the Federal Rules of Evidence. These exhibits, as duplicates of originals, under Rule 1003, Federal Rules of Evidence (Fed. R. Evid. 1003), are admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) circumstances exist where it would be unfair to admit the duplicate in lieu of the original. As to authentication, the rule (Fed. R. Evid. 902) provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to books, pamphlets, or other publications purporting to be issued by public authority. Clearly the original of these exhibits falls within this self-authentication provision concerning official publications. No genuine question was raised by the Appellant as to the authenticity of the original document nor would it be unfair to admit the duplicate in lieu of the original. These documents, publications of the U.S. Department of Commerce, were properly admitted into evidence under an exception to the hearsay rule pursuant to the Federal Rules of Evidence (Fde. R. EVID. 803).

Exhibit, Number 5, tidal current calculations made by the Investigating Officer using Exhibits Number 3 and 6, is not evidence and cannot be considered as substantive evidence. The Investigating Officer was neither sworn nor subject to cross-examination. This exhibit apparently was introduced to assist the fact finder, the Administrative Law Judge, in using the tables in Exhibits Number 3 and 6. However, the Administrative Law Judge on page 8 of his written opinion states that this exhibit established "that the current was not a major consequence(sic) in this allision." This apparent consideration of exhibit 5, the Investigating Officer's calculations and his statements concerning his calculations, as substantive evidence was improper and cannot be considered evidence against the Appellant.

Although erroneous in nature, this finding of fact by the Administrative Law Judge does not require reversal of his decision. Whether there was sufficient evidence to support the findings of the Administrative Law Judge will be discussed further in this decision. Note should be taken of the fact that testimony of the person charged may be utilized to fill gaps in the prima facie case in the absence of a stipulation to the contrary. Appeal Decision 1721 (CLIFTON). See also Appeal Decision 2215 (RILEY).

III

The Appellant contends the Investigating Officer should not have been allowed to reopen his case after resting so as to offer into evidence the Casualty Report forms (CG-2692). This issue has been addressed squarely in Appeal Decision 1576 (ASTRAUSKAS), which states:

> I am not much concerned that after a case has been "rested" it is permitted to be reopened. These remedial administrative proceedings under R.S. 4450 are not bound by the rules of criminal procedure or even by the court rules of civil procedure. Flexibility is allowable and desirable, to permit that the ultimate end of Title 52 of the Revised Statutes, safety at sea, be reached.

See also, Appeal Decision 2063 (CORNELIUS).

The Administrative Law Judge, aware that a dismissal without prejudice would constitute a "wheel spinning exercise", serving only to delay the adjudication and permit the Coast Guard to reinstitute proceedings, allowed the Investigating Officer to come forward and introduce into evidence the Casualty Report forms (CG-2692) for the purpose of establishing that the M/V OSAGE was the vessel involved in the allision and the Appellant its operator at the time of the allision. The initial decision of another Administrative Law Judge cited by counsel, affirmed by Appeal Decision 2199 (WOOD), has no procedential significance and/or authority, given the facts of the instant case. Additionally, Appeal Decision 2180 (METCALFE) is clearly distinguishable from Appeal Decision 1576 (ASTRAUSKAS). The record of the former was replete with numerous procedural errors, the least of which was the introduction of evidence of actions which occurred after the case had been rested and were irrelevant to the allegations specified initially. Accordingly, there was no error in admitting the Casualty Report forms.

IV

The Appellant contends that the admission of the Casualty Report forms (CG-2692) was improper under 46 CFR 5.20-120 and on hearsay grounds. This regulation states, "no person shall be permitted to testify with respect to admissions made by the person charged during or in the course of a Coast Guard investigation except for the purpose of impeachment." This prohibition has been held to apply to the statements by the person charged contained on a Casualty Report form (CG-2692). Appeal Decision 1913 (GOLDING). In the present case the Casualty Report forms were executed and submitted to the Coast Guard by the vessel's terminal manager not by the Appellant. See Appeal Decision 2174 (TINGLEY) for a discussion of the purpose of 46 CFR 5.20-120. Nowhere contained on

the Casualty Report form is there any statement identified to be that of the Appellant. In any event, the question of admissibility is mooted by the sworn testimony of the Appellant. After the Investigating Officer rested, the Appellant chose to testify. During his testimony he admitted that he was the operator of the M/V OSAGE, the alliding vessel. See Appeal Decision 2215 (RILEY). Testimony of a person charged may be utilized to fill gaps in the prima facie case in the absence of a stipulation to the contrary. Appeals Decision 1721 (CLIFTON).

V

Appellant argues in the alternative either that no presumption of negligence was created by the allision with the aid, or that if one properly was created, his evidence of the absence of negligence sufficiently rebutted it. On the practical side, it may be noted that only in rare instances are vessels underway of their own volition. Generally, some person or persons exercise control over vessel movements. In the context of hearings under the authority of R.S. 4450, the presumption arising from an allision may properly be applied against those persons, as it is their competence that is in issue in such hearings. The rationale for such a presumption has been well developed by several commentators and the applicability to R.S. 4450 hearings well established. Appeal Decision 2199 (WOOD).

In admiralty law the presumption rests on the commonly accepted fact that such damage is not ordinarily done by a vessel under control and properly managed. It has the effect of a prima facie case, placing the burden on the operator of the vessel to rebut the inference of negligent navigation. The doctrine that a ship's collision with a stationary object can support an inference of negligence in the management of the ship which obligates the party who was in charge of the vessel to go forward with evidence to rebut the inference is of long standing.

From the record as a whole, it is apparent that the parties well understand the effect of a rebuttable presumption of negligence. It is therefore not necessary to belabor this well established rule. The Appellant attempted to meet his burden by means of his own sworn testimony and on appeal argues that the presumption of negligence was successfully rebutted by testimony that the tug remained in the channel and did not go aground in the shallow waters. This argument fails to recognize that the flotilla under the Appellant's control was made up of tug and barges not tug alone.

The argument that the Appellant did not intentionally or willfully strike the range light, or that at the time of the

allision he was attempting to save both the vessel and the range light is misplaced. Specific intent is not an element of the offense nor are good intentions a defense in these remedial administrative proceedings. Appellant further argues, "the conditions in the bend where the incident occurred were significantly difficult and that Gayneaux exercised (sic) due care in attempting to recover the control of his tow after unforeseeable circumstances caused the tow sheer out of control. It is clear that the combination of current and wind caused the problem..." Implicit in the presumption operable here is the standard to which the operator is held: prudently navigated vessels do not allide with wharfs or moored vessels or aids to navigation. Evidence of compliance with the required standard of care might take the form of evidence of inevitable accident, evidence of superior force, or even evidence negating the happening of the allison. In short, evidence that the operator was free of negligence or that the allision could reasonably have occurred because of factors other than the operator's negligent conduct is necessary. Based upon the evidence in the instant case, the argument that unforeseeable circumstances caused the allision misses the mark. The proposition that where a party charged with negligence responds with a showing that the presumptively blameworthy occurrence could have resulted from factors other than his alleged negligent operation, the inference is negated, is insufficient where there is only mere speculation of such, with no foundation in fact.

In the instant case, the evidence offered by the Appellant to rebut the presumption of negligence is that: he made this voyage about every three days for the previous six months or so (TR-72,89); he made the voyage in other similar vessels before this (TR-100); he is experienced in bringing empty barges east-bound (TR-102); the weather was clear and the wind blowing from the south (tr-75); he measures wind by the flag on the tow and the way the tug is holding up the empties (TR-75 and TR-103); he didn't notice a current until after the allision (TR-75); he had not anticipated current prior to the allision (TR-84); he did not ease up on the throttles until he made a decision to stop when he realized he was in trouble (TR-78);they always have problems when they are traveling with light barges with the wind (TR-103); the difference between the first approach which resulted in the allision and the second approach when picking up the barges after the allision was that he then knew which way the tide was running (TR-104).

The evidence offered by the Appellant does not show that the presumptively blameworthy occurrence could have resulted from factors other than the Appellant's alleged negligent operation. On the contrary, the Appellant's own testimony tends to establish that he was negligent in the operation of the tug. See 46 CFR 5.05-20(2). The Appellant is charged with knowledge of tides,

currents and vessel maneuvering characteristics. All facts necessary to ensure a safe passage were or should have been known by the Appellant before he attempted and failed to negotiate the bend in the channel. See Appeal Decision 2272 (PITTS). Clearly, the presumption of negligence flowing from the allision was not rebutted adequately and was therefore available for the Administrative Law Judge to base his finding upon.

VII

The Appellant also takes exception to the decision of the Administrative Law Judge on the basis that the record fails to establish the standard of care to which the Appellant was held. Seeking to bolster this reasoning he cites Appeal Decision 2086 (ERICKSON). A careful reading of that case reveals that significant rebuttal evidence was introduced which supported the conclusion that the appellant had acted prudently under the circumstances he faced. It is clear that no general standard of conduct need be addressed in the event of an allision in order to establish a rebuttable presumption of negligence. Only the specific negligence found by an Administrative Law Judge required evidence of a special standard of care. Appeal Decision 2199 (WOOD). In the instant case, the presumption was not adequately rebutted. Implicit in the presumption is the standard of care to which an operator is held, i.e., prudently navigated vessels do not allide with fixed, charted structures.

VIII

The Appellant asks in the alternative that the Order of the Administrative Law Judge be modified to the imposition of an admonition in lieu of outright suspension citing his clean prior disciplinary record with the Coast Guard as well as the Table of Average Orders set out in 46 CFR 5.20-165. It is my view that the Administrative Law Judge considered all pertinent factors in deciding upon an appropriate sanction. I am convinced that the sanction rendered was appropriate and within the discretion of the Administrative Law Judge. I see no abuse of that discretion and therefore will not disturb the sanction on appeal.

Conclusion

The specification and the charge of negligence are proved by substantial evidence of a probative character.

ORDER

The order of the Administrative Law Judge dated at Galveston, Texas on 10 February 1982, is AFFIRMED.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 24th day of February 1983.